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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 497

WILLARD H. PHILLIPS,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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Respondent's brief demonstrates a calculated determination to ignore the obvious and to substitute, instead, bold assertions based on trivia alone. By artful manipulation of the witnesses' testimony, it seeks to implant in the mind the seed by which the confession may be found voluntary in spite of those proofs which demonstrate, inexorably, the compulsion by which that confession was ultimately extracted. We treat *seriatim* the assertions of respondent which warrant comment, under the following subheadings which correspond to those in respondent's brief.

A.

Conceding, in effect, that petitioner's testimony that he was "beaten around and forced to do different things" (805) was not adequately refuted because of the "failure to call all the police officers who questioned the petitioner" (Resp. Br. p. 13), respondent seeks to offset the natural consequence by claiming that it was petitioner's burden to call those witnesses and by a belittling allusion to the remarks by petitioner's trial counsel respecting the number of witnesses by whom he hoped to demonstrate the coercive measures used. Those witnesses—police officers—were all within the control of respondent, and even respondents' authorities (Br. pp. 12-13) support the claim that the prosecutor's failure to call them is significant. In a case such as this, can one realistically conceive of police officers being called, as defense witnesses, to testify to the use of coercion by themselves or by any of their brother officers?

In any event, the claim of violence is but one facet of this case. This Court takes account of the "totality of the circumstances" and the use of "more sophisticated modes of 'persuasion.'" (*Fikes* v. *Alabama*, 352 U. S. 191, 197; *Payne* v. *Arkansas*, 356 U. S. 560, 567; *Blackburn* v. *Alabama*, —— U. S. ——, 80 S. Ct. 274, 279.)

B.

Then too, respondent, at pages 14 and 15, seeks to refute petitioner's claim that he was "stripped • • • and subjected to a humiliating examination of his private parts" by asserting that "he was immediately furnished fresh clothing" and that the "result" of the examination was "beneficial." The record does show that somewhere along the line petitioner was—after being stripped—furnished other clothing (261); of immediate replacement there was no testimony whatever. Furthermore, the stripping and

"washing" are fully conceded and common sense dictates that new clothing could not have been donned until after the police experiment had been completed. This was but another step in the "softening" process—while the prosecutor in *Malinski* conceded that the removal of clothing was to humiliate the prisoner, here we have the police admitting their purpose "to get a confession" (342), their design to force and extort a confession—to "exact" one (346). Moreover, this incident, by its very nature, was a humiliating one regardless of the motives of the police and the duration of petitioner's nudity.

C.

Likewise, respondent, in its brief (p. 15) makes much of the fact that petitioner was offered food, coffee and cigarettes though it is conceded that he had none. Surely, his abnormally long abstention from food and drink, even if offered, is strongly indicative of his overborne mental state. A still more important factor—completely ignored by respondent—is that he had no rest, no sleep, for a period of 23 hours or more immediately preceding his confession (296, 616).

D.

Respondent has gone to great lengths in an attempt to compress the period of interrogation to a mere eight and one-half hours (Resp. Br. pp. 16-19, 24-25) and offers a "whitewashing" for its failure to effect a seasonable arraignment. The record, however, demonstrates the contrary.

Whether Phillips was interrogated concerning a disappearance or a homicide—the fact remains that for more than 18 hours he was subjected to almost continuous inquisition, finally succumbing at 5:00 a.m., when he gave "answers that would expedite" the inquisition—it was his

only surcease (805-807, Pet. Main Br. pp. 4-6, 9). In fact, it was hours earlier that Rofheart—who had not been subjected to that interrogation and prodding—had retired, a "very tired" man (334).

Considerable argument is offered for the delay in arraignment—the principal claim being that the police did not realize that a homicide had occurred until 5:00 P.M. on May 13 and that their inquisition did not, therefore, actually commence until that hour. That, of course, disregards the cumulative effect of the total detention and interrogation and is the equivalent of saying that they began their coercive measures too soon—that they should be excused for all that transpired before they had the proof of that which they had suspected all the time—the felonious disposition of Sunday Graham by petitioner.

Had respondent's officers so desired, they could properly have arrested petitioner at least upon the discovery of Sunday's body at 4:00 p.m., May 13. Then it was known that a felonious homicide had been committed; then they had actual and reasonable cause to believe that petitioner had effected that homicide. Here is what they knew—not suspected—at 4:00 p.m., May 13, when, as respondent concedes, a magistrate was still available for arraignment purposes and was required, by court rule, to be available for another hour (Resp. Br. p. 18):

1. Sunday Graham had been missing since 2:50 P.M. on May 12, 1958 and was reported as missing on the same day (171-174; 178-179).

2. A description of Sunday and her clothing, including her distinctive school uniform, was furnished to detectives on May 12 (95, 232-234).

3. On the morning of May 13, the detectives were advised that Sunday had, on the prior afternoon, en-

tered and been driven off in the automobile of a male negro, and of the circumstances surrounding that episode (186-187, 191-192, 233-234).

4. Phillips' automobile, and clothing taken by detectives from his room on the morning of May 13, tallied with the description of the car in which Sunday had been driven away and with the description of the clothing worn by the operator of that car (187-191, 237-238, 245; Exhs. 11, 12, 13).

5. At 3:00 P.M. May 13, petitioner admitted being in the neighborhood with his car where, and at about the time that, Sunday had been observed entering the automobile (1341; Exh. 14).

6. Knowledge of the homicide was furnished to the detective in charge of the investigation at 4:00 P.M., May 13 (258).

7. The dead body found was that of a young negro girl, dressed in the school uniform and clothing identical to that worn by the missing Sunday Graham (Exhs. 15, 16).

8. Peanut shells were present in the victim's hair and also in petitioner's car which had been observed by detectives as early as noon, May 13 (245, 386-387, 496-497).

9. Blood was found on and beneath the body (392, 458). In addition, stains, apparently blood, were present on underclothing taken from petitioner's room which, so far as the record shows, was searched but once—at about noon May 13 (237-238, 471-477, 1430).

All this information, possessed by the police at 4:00 P.M., May 13, was more than sufficient, particularly in the light of the threat voiced to Sunday's mother (114-116) to per-

mit an arrest, and to support a determination by the magistrate to hold petitioner to answer a charge of felonious homicide. *New York Code of Criminal Procedure,* Secs. 207, 208; *People* v. *Bieber* (not officially reported), 100 N.Y.S. 2d 821; *People* v. *Ehrlich* (not officially reported), 14 N.Y.S. 2d 125; *People* v. *Pearsall* (not officially reported), 59 N.Y.S. 2d 616.

In fact, that proof, uncontradicted and unexplained, was sufficient to support an indictment. *New York Code of Criminal Procedure,* Sec. 251; *People* v. *Lieberman,* 3 N.Y. 2d 649.

The continued interrogation, despite the evidence then at hand, demonstrates the true purpose and desire of respondent's agents—not to solve a crime, but rather to extract a confession to guarantee a conviction therefor. This violation of the rule of the *Spano* case appears also from admissions of Rofheart and the prosecutor himself. "Before" petitioner confessed, the prosecutor "knew" he was "sunk" (1437). Many hours prior to the confession, Rofheart had reason to suspect the petitioner (341), and knew he had "proof to arraign" and "to arrest" him, and had "sufficient proof for a case" (348-350) but nevertheless kept him in custody to "exact" a confession (343).* As in *Malinski* v. *New York,* 324 U.S. 401, 407, the prosecutor and Rofheart should be taken at their word.

Even if petitioner had been promptly arraigned on the homicide charge, the tactics employed by the police in all likelihood would have continued unchanged in order to wring from petitioner the confession they so much desired. Long after the first confession, and more than 24 sleepless

* Certain of these admissions were subsequently qualified to some extent but only after the prosecutor had hammered away at the witness in a manner which made it abundantly clear that that qualification was desired (347-350).

hours after petitioner's apprehension, respondent's agents were still bent upon securing a full, detailed confession covering every particular of the crime which, they were satisfied, had been committed by petitioner (Pet. Main Br. pp. 6, 9). Respondent would have the Court ignore the events subsequent to petitioner's 5 a.m. confession (Resp. Br. pp. 16-17), but *Haley* v. *Ohio,* 332 U.S. 596, 600, holds to the contrary.

E.

If, as respondent claims, the prosecutor did not know the nature of the spots on petitioner's underclothing, but could only have made an assumption in that regard (Resp. Br. p. 20), one cannot escape the conclusion that the prosecutor deliberately made his assertion to petitioner that it was Sunday's blood, with the sole purpose of trapping him when his tortured mind had become weakened to the point where it could no longer resist the onslaught of questions. There was the vice.

F.

Petitioner's resistance to the continued interrogation by the prosecutor for "almost an hour" after having been subjected to the police inquisition for approximately 19 hours simply establishes that he had been successfully worn down by their pressures. This result must have been anticipated by respondent's agents when, at 11:00 P.M. on May 13, they alerted the stenographer who ultimately recorded the confession, when they transported petitioner to headquarters in the wee hours of the morning, and when they finally summoned the stenographer at 4:15 A.M., May 14. They had merely erred respecting the hour at which he would become as putty in their hands.

G.

Respondent argues that petitioner was quite articulate in confessing, but concedes that some answers were suggested by the prosecutor (Resp. Br. pp. 22-23). This suggests that more forceful and blunter hints had been insinuated by the police—uninhibited by the presence of a stenographer—into petitioner's mind during the previous 19 hour ordeal. Clearly, he must have succumbed to the "brainwash," and was merely parroting the ideas they had thus instilled.

H.

The contention that only 8½ hours were spent in questioning petitioner ignores—but does not deny—the continued interrogation which began at 11:00 A.M.; and it cleverly overlooks the experiment conducted by Dr. Lukash, and the activities of Inspector Pribyl by which petitioner was induced to submit to their examination. In a similar attempt to shrink the period of detention, respondent says that the police would not have restrained petitioner "if he had wished to leave" prior to 5 P.M. (Resp. Br. p. 6). Can anyone imagine what would have happened had this petitioner attempted to leave under the circumstances of this case?

The hand shaking incident is stressed (Resp. Br. pp. 9, 26) but is of no more significance than Haley's statement that his confession was voluntary (*Haley* v. *Ohio*, 332 U.S. 596, 598). Note, that just after this incident, the prosecutor here subtly suggested or promised leniency, stating that petitioner might not be "sunk" if he related exactly what happened (1437). Counter to the prosecutor's claim, we could as well assume that petitioner shook hands to signify his acceptance of similar prior promises by the

police, to signify his defeat, or simply in the hope of avoiding further coercive treatment.

Respondent also suggests that petitioner's experienced trial counsel would have adduced more concrete proof of coercion if such were the case—that he made the best of a hopeless situation (Resp. Br. pp. 13, 25-26). Due allowance must be made for the manner in which the issues here raised were presented in the lower court—the defense was unorthodox. It was a "game of tag or hopscotch" according to the prosecutor's summation (1120). Although the Trial Judge felt obliged to instruct the jury on the law of insanity (1258), and although psychiatric and other testimony was sufficient to raise that issue (778, 794, 836, 863-864, 875, 877, 883, 905, 954-955, 958), defense counsel expressly waived that defense (40, 818-819) and submitted no argument or requests to charge with respect thereto. In addition, counsel deliberately elicited, or attempted to elicit, from the prosecution's first witness testimony that petitioner had carnally assaulted young white girls and had engaged in an adulterous relationship with Sunday's mother (142-145, 147-149, 710-711).

CONCLUSION

Here, as we have shown, petitioner was detained wholly incommunicado, and subjected to interminable interrogation and coercive treatment during the day and into the dead of night, and beyond the time when he not only could, but should have, been arraigned, and was deprived of sleep and rest, and was without food or drink. These circumstances, we say, on the established, conceded facts constituted a denial of due process.

Respectfully submitted,

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